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No. 82-195

IN THE

Supreme Court of the United States

October Term, 1982

VAN D. MUELLER and JUNE NOYES,

Petitioners,

vs.

CLYDE E. ALLEN, JR., DENNIS J. BERTHIAUME, KAREN F. BERTHIAUME, THOMAS W. DZIK, MARY J. DZIK, EDWARD F. FUJAN, JOLEEN A. FUJAN, BRENDA B. BECKER, RICHARD C. HOLLINGSWORTH, MARJORIE HOLLINGSWORTH, ROGER DEHAAN and DOROTHY DEHAAN,

Respondents.

BRIEF FOR RESPONDENTS DENNIS J. BERTHIAUME, ET AL.

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QUESTION PRESENTED FOR REVIEW

Does a Minnesota Income Tax Statute, which grants a taxpayer a deduction from gross income for the amount he has paid to others (not to exceed $500 for each dependent in grades K to 6 and $700 for each dependent in grades 7 to 12) for tuition, textbooks and transportation of each dependent in attending an elementary or secondary school, wherein a resident of the state may legally fulfill the state's compulsory attendance law, which is not operated for profit and which adheres to the provisions of the Civil Rights Act of 1964, with no distinction being made as to whether or not such school is public or nonpublic, and with the requirement that such "textbooks" shall mean and include books and other instructional materials and equipment used in elementary and secondary schools in teaching only those subjects legally and commonly taught in public elementary and secondary schools in the state and shall not include instructional books and materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship, meet the constitutional requirements as set down by the United States Supreme Court under the Establishment Clause of the First Amendment?

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Authorities	iv
Statement of the Case	2
Summary of Argument	4
Argument	6
I. Minn. Stat. §290.09, Subd. 22, Does Not Have the Primary Effect of Advancing Religion	6
A. Background	6
B. Primary Effect	9
II. Minn. Stat. §290.09, Subd. 22, Has a Secular Legislative Purpose	14
III. Minn. Stat. §290.09, Subd. 22, Does Not Foster Excessive Entanglement of Church and State	15
Conclusion	17

TABLE OF AUTHORITIES

Cases:	Page
Board of Education v. Allen, 392 U.S. 236 (1968)	9, 11
Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973)	3, 9, 14
Everson v. Board of Education, 330 U.S. 1 (1947)	9, 11
Lemon v. Kurtzman, 403 U.S. 602 (1971)	4
Meek v. Pittenger, 421 U.S. 349 (1975)	9
Minnesota Civil Liberties Union v. Roemer, 452 F.Supp. 1316 (D. Minn. 1978)	2, 15
Mueller v. Allen, 514 F.Supp. 998 (D. Minn. 1981)	3, 4, 6
Mueller v. Allen, 676 F.2d 1195 (8th Cir. 1982)	3
Rhode Island Federation of Teachers v. Norberg, 479 F.Supp. 1364 (D.R.I. 1979)	12
Rhode Island Federation of Teachers v. Norberg, 630 F.2d 855 (1st Cir. 1980)	*passim*
Roemer v. Board of Public Works of Maryland, 426 U.S. 736 (1976)	10
Tilton v. Richardson, 403 U.S. 672 (1971)	11
Walz v. Tax Commissioner, 397 U.S. 664 (1970)	11, 15
Wolman v. Walter, 433 U.S. 229 (1977)	9
Statutes and Laws:	
Minn. Stat. §290.09, subd. 22	*passim*

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BRIEF FOR RESPONDENTS DENNIS J. BERTHIAUME, ET AL.

STATEMENT OF THE CASE

This case presents a constitutional challenge to Minn. Stat. §290.09 as violative of the Establishment Clause of the First Amendment to the United States Constitution. This statute has been in effect since 1955 and grants to a taxpayer a deduction from gross income *for the actual amount he has paid to others*, up to a stated maximum for each dependent in grades K to 6 and a stated maximum for each dependent in grades 7 to 12, for tuition, textbooks and transportation of each dependent in attending an elementary or secondary school, wherein a resident of Minnesota may legally fulfill the state's compulsory attendance laws, without any distinction as to whether such school is public or nonpublic, religious or nonreligious.

In the first challenge to this statute, a three judge panel of the United States District Court for the District of Minnesota, in the case of *MCLU v. Roemer*, 452 F.Supp. 1316 (D. Minn., 1978), upheld its constitutionality under the Establishment Clause of the First Amendment. In that case, the Court stated:

> In our view the Minnesota law, if and when examined by the Supreme Court, will be found on the constitutional side of Jefferson's wall because the statute is neutral and neither advances nor impedes religious activity, benefits the parents of children attending both public and nonpublic schools, has received unchallenged historical acceptance, and is analogous to the long recognized practice of tax deductible contributions to religious and charitable causes by federal and state governments. Accordingly, the statute does not have the primary effect of advancing religion in violation of the Establishment Clause.

MCLU v. Roemer, id. at 1332.

Following this decision in *Roemer*, the law remained unchallenged until commencement of the present litigation, when its constitutionality was again upheld in the United States District Court for the District of Minnesota on May 13, 1981, [*Mueller v. Allen*, 514 F.Supp. 998 (D. Minn. 1981)], and then, on appeal, was upheld by the United States Court of Appeals for the Eighth Circuit on April 30, 1982, [*Mueller v. Allen*, 676 F.2d 1195 (8th Cir. 1982)], in a decision which is the subject of the present appeal.

The statute allows a deduction for educational expenses related to compulsory education. It is not limited to only those types of expenses peculiar to nonpublic schools. Furthermore, the statute provides for a tax deduction relating to actual educational expenses incurred and does not provide for a tax credit of the type struck down by *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973). As such, the statute provides for a genuine tax deduction of the type distinguished by the Court in *Nyquist*. Id. at 790 n. 49. This case presents the first review of the constitutionality of such a genuine tax deduction statute.

Petitioners argue that the deductions are generally available only to parents of children in nonpublic schools. They have failed, however, to consider the many categories of tuition deductions likely to be taken by public school parents, as well as the multitude of deductible costs in the categories of transportation, books, materials and equipment, which may be available as well to public school parents. The parent of any school children in the State of Minnesota is likely to incur expenses which are deductible under the statute.

The Court below considered an apparent conflicting decision from the United States Court of Appeals for the First Circuit,

Rhode Island Federation of Teachers v. Norberg, 630 F.2d 855 (1st Cir. 1980). While the challenged statutes in the *Norberg* case and in this case are identical, the statistical evidence submitted and considered by the courts in each case had significant differences. The Court below, in evaluating the benefits of the statute in question, found that the statute provides relief which "is available to all parents with dependents attending elementary and secondary schools". *Mueller v. Allen*, supra at 1002.

Based upon the statistical evidence and other evidence in the record, the Court below reached a different conclusion from that of the First Circuit in *Norberg*, finding that *Norberg* was distinguishable from this case. There is no real conflict between the decision in *Norberg* and the decision of the Court below, only an apparent conflict because the Court in *Norberg* did not have sufficient facts on which to reach a decision as to the benefited class.

SUMMARY OF ARGUMENT

The Court below held that the challenged statute does not violate the establishment clause of the first amendment. In examining the law under consideration, it is necessary to apply the three part test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Under the three part test, a law, in order to be constitutional under the Religion Clauses, first, must have a secular legislative purpose; second, the primary or principal effect of the law must neither advance nor inhibit religion; and, third, the law must not foster excessive entanglement between government and religion.

I. To be constitutionally permissible, a statute must provide benefits on a neutral basis and not have the primary effect of advancing religion. The Petitioners' contention is that the statute's benefits are generally available only to the parents of nonpublic school children. However, Petitioners' statistical evidence in support of that position is flawed and fails to take into account the substantial expenditures made by public school parents which are deductible under the statute.

The challenged statute does not provide for any direct grant or tax credits of the type struck down in *Nyquist*, supra. Rather, it makes available to all eligible taxpayers deductions for the designated educational expenditures without regard to whether the expenditures were made on behalf of public school children, nonpublic nonsectarian school children or nonpublic sectarian school children. It provides for a genuine tax deduction.

II. The purpose of the present statute is a properly secular one designed to promote adequate educational opportunity for all children who are required by Minnesota law to attend schools. To that end, the challenged statute has a valid secular legislative purpose.

III. The statute in question has been in existence for over twenty-seven years. Since no evidence of entanglement of church and state has risen during that period of time, it is reasonable to assume that the danger of excessive entanglement is not present. This statute does not require involvement by the state in church matters. Rather, the statute provides that an individual taxpayer may claim a deduction, which would be subject to audit, with the taxpayer having the burden of establishing his eligibility for the deduction.

ARGUMENT

I. MINN. STAT. §290.09, SUBD. 22, PROVIDES FOR A COMPREHENSIVE SYSTEM OF EDUCATIONAL TAX DEDUCTIONS WIDELY DISTRIBUTED AMONG ALL ELIGIBLE TAXPAYERS WITHOUT REGARD TO THEIR RELIGIOUS PREFERENCES OR AFFILIATIONS AND, THEREFORE, DOES NOT HAVE THE PRIMARY EFFECT OF ADVANCING RELIGION.

A. BACKGROUND.

The statute in question sets forth a number of deductions that a Minnesota taxpayer may take on his income tax return. The statute is comprehensive in that it provides for deductions for every conceivable type of educational expense reasonably related to compulsory education. It is not limited to only those types of expenses peculiar to nonpublic schools.

An important consideration is that the Minnesota law allows a genuine tax deduction. A tax deduction can be easily contrasted to a tax credit. A tax credit grants to a taxpayer a predetermined or arbitrary reduction which results in a definite tax benefit. A tax deduction, on the other hand, results from actual expenses incurred by a taxpayer. Under the Minnesota law, that deduction is available to taxpayers only for the actual amount he has paid to others, up to a stated maximum, for carefully defined educational expenses. Such a deduction does not automatically result in a tax benefit.

The trial court found that the statute provided tax relief in three broad categories of educational expenses, namely, tuition, transportation and textbooks. *Mueller v. Allen*, supra, 514 F.Supp. at 1000 (D. Minn. 1981). The Court went on to detail the various subcategories of each of these categories of deductible expenses.

"Tuition" includes eight subcategories of expenses, namely: (1) tuition in the ordinary sense; (2) tuition charges to public school students who attend public schools outside their residence districts; (3) certain summer school tuition; (4) the tuition charged by a school for private tutoring of slow learners; (5) tuition for instruction for those who are physically unable to attend school; (6) tuition charged by a private tutor for instruction that is acceptable for credit; (7) Montessori school tuition; and (8) tuition for driver's education which is part of the school curriculum.

"Transportation" includes three subcategories of expenses, namely: (1) transportation of students in districts that do not provide free transportation; (2) transportation of students who live in one district but attend school in another; and (3) transportation of students who attend school in their residence districts but who live too close to school to qualify for free transportation.

"Textbooks" include ten subcategories of expenses, namely: (1) textbooks in the traditional sense; (2) tennis shoes and sweatsuits required for physical education; (3) camera rental fees for photography classes; (4) ice skates rental fees paid to the school; (5) rental fees for calculators for math classes; (6) home economics materials needed for minimum course requirements; (7) special metal or wood needed to meet minimum shop class requirements; (8) supplies needed to meet minimum art class requirements; (9) rental fees for musical instruments; and (10) pencils and special notebooks for various classes.

Petitioners argue that the major economic benefit of the statute provides disproportionate aid to the parents of children attending sectarian schools. Petitioners' Brief at 42. In support of this allegation, Petitioners rely upon the same flawed

statistics presented in the lower courts. They argue that the major economic benefit of the statute flows from the tuition deduction and seek to show, by implication, that since nonpublic schools charge tuition and public schools do not, it is the sectarian schools that derive the benefit of the tuition deduction.

Petitioners' argument ignores a number of factors. First, besides tuition in the ordinary sense, there are seven additional subcategories of tuition as likely to be paid by public school taxpayers as by nonpublic school taxpayers. Secondly, this argument ignores the substantial deductions available to nonpublic, *nonsectarian* school parents.

Petitioners' reliance on the fact that the state loses about 2.4 million dollars a year because of the tuition deduction is misplaced. That dollar figure is for the revenue loss by reason of deductions allowed under the challenged statute. (JA-5). Petitioners have failed, however, to present any evidence that reliably relates the estimated revenue loss to tuition deductions taken by sectarian school parents as opposed to public school or nonpublic nonsectarian school parents. If one considers the many subcategories of tuition deductions which are likely to be taken by public school parents alone, the revenue loss figure becomes meaningless.

Petitioners argue further that the fact that the statute on its face makes the deductions available to public school parents is mere "window dressing". Petitioners' Brief at 42. Petitioners fail to place proper emphasis on revenue receipts by public school districts from charges for tuition and fees relating to education. Rather than constituting mere window dressing, the facts have shown these expenditures for deductible expenses by public school students to be substantial. During 1978-79, expenditures for tuition for public school students

were in excess of two million dollars and revenues from fees from public school students amounted to nearly one million dollars. Affidavit of Ronald Moir. (JA-38). These figures do not even include driver education receipts for the summer which must be assumed to be high.

Thus, the public schools can demonstrate receipts of nearly three million dollars for one school year from tuition and fees alone. This fact, together with the other subcategories of tuition which are as likely to be paid by public school students as by nonpublic school students, clearly shows that the statute provides substantial economic benefits to public school parents. Added to that are the substantial deductions available to nonpublic, nonsectarian school students. Given these facts, Petitioners' agrument that the statute principally benefits the parents of children attending sectarian schools is untenable.

B. PRIMARY EFFECT.

The second part of the three part test mentioned in *Lemon*, supra, is that the primary effect of the law must neither advance nor inhibit religion. Tax support of education is constitutionally permissible even if one of the effects of such support is that religious and other nonpublic schools are incidentally and indirectly benefited. *Everson v. Board of Education*, 330 U.S. 1 (1947); *Board of Education v. Allen*, 392 U.S. 236 (1968); *Meek v. Pittenger*, 421 U.S. 349 (1975); and *Wolman v. Walter*, 433 U.S. 229 (1977).

In discussing the primary effect test, two important considerations must be recognized. The first is that indirect or incidental benefits to religious institutions will not invalidate a law. As the Court in *Nyquist*, supra, at 771, stated: "It is equally well established, however, that not every law that confers an 'indirect', 'remote', or 'incidental' benefit upon reli-

gious institutions is, for that reason alone, constitutionally invalid."

The second consideration is that as long as the law presents a neutral posture, it will not fail the primary effect test. As the Court points out in *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 747 (1976):

> . . . [R]eligious institutions need not be quarantined from public benefits that are neutrally available to all.
>
> The Court has not been blind to the fact that in aiding a religious institution to perform a secular task, the State frees the institution's resources to be put to sectarian ends. If this were impermissible, however, a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair. The Court never has held that religious activities must be discriminated against in this way.

Petitioners rely chiefly on *Nyquist*, supra, in arguing that the present statute has the primary effect of advancing religion. Petitioners argue that the statute, both in form and in substance, is indistinguishable from *Nyquist*. Petitioners' Brief at 61. In *Nyquist*, the Court invalidated a statute that provided for direct grants to nonpublic schools for building maintenance and repairs, allowed reimbursement to certain low-income parents for money paid to send their children to nonpublic schools and provided tax credits for parents who paid money to send their children to nonpublic schools.

The statute in *Nyquist*, unlike the Minnesota law, was simply not a true tax deduction statute. It provided tax benefits only to those who had nonpublic school dependents. It provided for direct grants or reimbursement of expenditures to either nonpublic schools, pupils or parents of such pupils.

The Minnesota law, on the other hand, is clearly distinguishable from the law invalidated in *Nyquist*. The present law makes available to all eligible taxpayers deductions for the designated educational expenditures without regard to whether the expenditures were made on behalf of public school children, nonpublic nonsectarian school children, or nonpublic sectarian school children. All Minnesota taxpayers who spend money on behalf of their elementary or secondary school dependents in one or more of the three categories of deductions may share in the benefit of the law. In no event is the school itself a direct beneficiary of the law.

If one examines those cases where the Court has upheld statutes which provide benefits to private, sectarian schools, such cases are distinguishable by the fact that in each the assistance was neutral and served primarily to benefit the nonreligious activities of sectarian schools. In each such case, the neutral assistance had an indirect effect of benefiting the sectarian institution but such indirect benefit was not reason to find the provisions constitutionally invalid. *Everson v. Board of Education*, supra; *Board of Education v. Allen*, supra; and *Tilton v. Richardson*, 403 U.S. 672 (1971).

If one also examines cases such as *Nyquist*, supra, where the Court has invalidated statutes as violative of the establishment clause, it is evident that in such cases the purpose of the law was to provide assistance to private schools, primarily private sectarian schools. In such cases, the primary effect is financial assistance for nonpublic, sectarian schools.

In *Nyquist*, supra, at 790 n. 49, the Court specifically deferred any decision as to whether a genuine tax deduction would be constitutionally permissible under the "neutrality" test in *Walz v. Tax Commissioner*, 397 U.S. 664 (1970). The Minnesota law provides for such a genuine tax deduction as

opposed to the tax credit invalidated in *Nyquist*. Under the Minnesota law, to be eligible for such a deduction, a parent must make an actual expenditure for a defined secular purpose. Thus, a taxpayer's benefit is solely related to such expenditures. Since this deduction is available to the parents of all school children, public or nonpublic, sectarian or nonsectarian, it is constitutionally neutral and does not violate the establishment clause. Any benefit which is granted to sectarian schools by the statute is indirect and incidental.

Petitioners cite *Norberg*, supra, as a case in which a tax deduction similar to that involved here was invalidated. However, as was found by the Court below, *Norberg* is distinguishable from this case. First, the Court in *Norberg*, supra at 861, distinguished *MCLU v. Roemer*, supra, by saying that the benefited class there was presumed to have primarily secular characteristics and, therefore, the law was valid under *Walz*, supra.

Second, and more importantly, the *Norberg* Court found that most of the Rhode Island parents who were eligible for the tuition deduction sent their children to sectarian schools. Supra at 859. However, in arriving at that conclusion, the *Norberg* Court relied upon an anlysis completely at odds with that of the lower courts in this case. In making its finding of fact as to the percentage of parents who were eligible for the challenged tuition deductions and who sent their children to sectarian schools, the Disrict Court in *Rhode Island Federation of Teachers v. Norberg*, 479 F.Supp. 1364, 1366 (D.R.I. 1979) simply added the number of tuition-paying children who attended nonpublic schools in Rhode Island to the number of students attending public schools in Rhode Island on an other than tuition-free basis. After combining these figures, the Court found that these were the children whose parents were

eligible for the tuition deduction and that these children overwhelmingly attended sectarian schools.

It is obvious that the *Norberg* Court, unlike the lower courts in this case, did not examine the types of comprehensive expenditures which would qualify as "tuition" under the Minnesota law. Thus, the *Norberg* Court did not include expenditures for summer school tuition, for tuition charged by a school for private tutoring of slow learners, for tuition for instruction for those who are physically unable to attend school, for tuition charged by a private tutor for instruction that is acceptable for credit, for Montessori school tuition and for tuition for driver's education which is part of the school curriculum.

It is clear that *Norberg*, supra, is distinguishable from this case. There is no real conflict between it and the decision in this case since the Court in *Norberg* did not make the same findings of fact as to what constituted eligible deductions under the challenged statutes.

The Minnesota law is further distinguished from the law found unconstitutional in *Norberg* by the fact that the Minnesota statute does not automatically produce a tax benefit. Only if an eligible deduction allows a taxpayer to move to a lower tax bracket does he gain a benefit under the statute.

The Minnesota law provides for a genuine tax deduction. It provides benefits to all taxpayers without any distinction as to whether the taxpayer's children attend schools which are public or nonpublic, sectarian or nonsectarian. It does not have the primary effect of advancing religion. Any benefit to religious institutions is indirect or incidental and will not invalidate the statute.

II. MINN. STAT. §290.09, SUBD. 22, HAS A SECULAR LEGISLATIVE PURPOSE.

The promotion by the state of education which will fulfill the basic educational requirements of law and also encourage diversity of ideas is a proper secular function. Even in cases in which the courts have declared statutes to be violative of Establishment Clause proscriptions, those Courts have invariably found the existence of a proper legislative purpose. For example, in *Committee for Public Education v. Nyquist*, supra at 773, the Court, in striking down certain direct financial aids to nonpublic schools and parents of nonpublic school children, nevertheless recognized the valid secular purpose of the law in question.

Petitioners contend that the intent of the Minnesota legislature is to grant benefits to religious institutions rather than aiding education generally. However, Petitioners fail to present any evidence or reasonable argument in support of this contention.

The purpose of the present statute in Minnesota is a properly secular one designed to promote adequate educational opportunity for all citizens who are required by Minnesota law to attend schools and meet the requirements of curricula prescribed by the state. Petitioners' belated argument that the amendments to the statute demonstrate an impermissible purpose are misplaced in light of almost thirty years of history of the legislature's interest in promoting education in this state.

III. MINN. STAT. §290.09, SUBD. 22, DOES NOT FOSTER EXCESSIVE ENTANGLEMENT OF CHURCH AND STATE.

The Petitioners' argument that the challenged statute fosters excessive entanglement between church and state was best addressed in *MCLU v. Roemer*, 452 F.Supp. 1316, 1318 n. 1 (D. Minn., 1978):

> . . . [T]he Supreme Court has implicitly recognized that the church-state contacts occasioned by normal tax administration procedures do not give rise to excessive and unconstitutional entanglements between government and religion. *Walz v. Tax Commission*, 397 U.S. 664, 90 S.Ct. 1409, 1414-15 (1970). In that case, the court upheld New York City's exemption of church property used solely for religious purposes from real estate taxation. Obviously, administration of such an exemption requires a finding by some official that a given parcel of realty is used for genuine religious purposes. However, this administrative interface between the tax official and the church property was insufficient to create an entanglement problem. The administration of the challenged statute will foster even less entanglement since the eligibility of schools whose students may make use of the deduction is not determined by an indepth case-by-case analysis of the genuineness of the schools religious functions. Rather, eligibility is clearly established if a school meets certain entirely secular requirements—non-profit status, compliance with compulsory attendance laws, and adherence to State and Federal Civil Rights Statutes.

This statute has been in existence for over twenty-seven years. During that period of time, no evidence of entanglement has arisen either in the sense of intrusion by the state into the affairs of the church or by the creation of political and religious divisiveness.

The absence of entanglement during this period of time is obvious when one examines the administration procedures involved in the enforcement of the statutes. The state's only concern with the school is whether it can legally fulfill the compulsory education requirements and whether it can verify the taxpayer's claimed expenditures.

This individual taxpayer claims the deduction on his tax return. Thus, the taxpayer has the burden of proving the amount and eligibility of any claimed expenditures. The school's only involvement in this aspect would be to verify a given expenditure which would have been made to it.

Petitioners focus their entanglement argument on the claim that the state must conduct an exhaustive audit to ensure that the expenditures are used for secular purposes only. Petitioners have failed, however, to understand the tax administration procedures which are involved. No surveillance or inspection of activities performed by religious institutions is made. The contacts with the school itself are minimal. It is the individual taxpayer who is subject to audit.

If, as Petitioners allege, this statute fosters excessive entanglement, some actual evidence of the impermissible interaction would have surfaced in twenty-seven years of enforcement by the state. In the absence of such evidence, it seems fair and reasonable to assume that the danger of excessive entanglement is not present with the statute in question.

CONCLUSION

In arguing for or against the constitutionality of a law under the Establishment Clause, it is sometimes easy for one to take a hypertechnical approach and to apply rules without regard to an examination of the high principles and values from which those rules have been derived. One must not, however, lose perspective and become shortsighted and inflexible in his analysis.

Opponents of the kind of law under consideration seem often to have lost sight of the constitutional principles and have erroneously concluded that any law which incidentally and secondarily benefits persons who choose to exercise religious beliefs, and any law which sustains any interaction between church and state is unconstitutional. In short, they have insisted that "benevolent neutral¹ty" be translated into "opposition" and that "unentangling interaction" be understood to mean "isolation".

Minn. Stat. §290.09, subd. 22 is a neutral tax statute that neither advances nor impedes religion. The statute has a proper secular legislative purpose and is administered in a manner which does not foster excessive entanglement. For these reasons, the statute is constitutional and not violative of the Establishment Clause of the First Amendment. Accordingly, this Court is urged to affirm the judgment of the Court of Appeals.

Respectfully submitted,

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